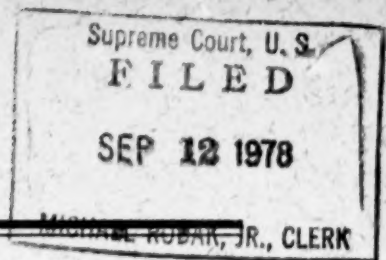


No. 78-235



**In the Supreme Court of the United States**

OCTOBER TERM, 1978

**PITTSBURGH & NEW ENGLAND TRUCKING CO., ETC.,  
PETITIONER**

**v.**

**THE UNITED STATES, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT**

**MEMORANDUM FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION**

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Solicitor General,  
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At issue is whether the court of appeals properly dismissed a petition for review because petitioner failed to exhaust clearly mandated administrative remedies.

Petitioner, a common carrier by motor vehicle, filed a 151-part gateway elimination application pursuant to the Interstate Commerce Commission's "gateway elimination" rules.<sup>1</sup> The application was filed without the evidence

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<sup>1</sup>Under what was termed the "gateway elimination" policy, the Commission agreed to consider applications from trucking companies for direct service authorizations between points that the companies had previously served only indirectly. *Gateway Elimination Decision*, 119 M.C.C. 530. 49 C.F.R. 1065.1. This Court upheld the gateway elimination rules in *Thompson Van Lines, Inc. v. United States*, 423 U.S. 1041, affirming 399 F. Supp. 1131 (D. D.C.).

required by the gateway rules. Petitioner subsequently attempted to file late evidence, but it was rejected by the agency. Because the record did not contain the supporting evidence required by the gateway rules, the application was dismissed. Petitioner then filed a petition for reconsideration, which a three-member division of the Commission denied in August 1975.

Petitioner sought judicial review in the United States Court of Appeals for the Third Circuit. During the pendency of the petition for review, the Commission issued a policy statement which provided for the acceptance of previously tendered late-filed evidence. As a result, the Commission, subject to the court's approval, reopened petitioner's application for acceptance and consideration of the late-filed evidence. The court of appeals then granted the Commission's unopposed motion to remand the case.

The reopened proceeding was assigned to a Commission employee review board for initial decision. After considering the additional evidence of record, the employee review board denied petitioner's application by an order served in October 1976 (Pet. App. B).

Instead of seeking Commission consideration of the employee board's order, petitioner filed a petition for judicial review. On May 3, 1978, the court of appeals granted the Commission's motion to dismiss for failure to exhaust administrative remedies (Pet. App. A).

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review is not warranted.

1. It is well settled that judicial review of administrative agency decisions must be postponed until the available administrative remedies have been exhausted. *Federal*

*Communications Commission v. Schreiber*, 381 U.S. 279, 296; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51. Section 17(9) of the Interstate Commerce Act, 24 Stat. 385, as amended, 49 U.S.C. 17(9), specifically bars judicial review of employee board orders, unless a petition for reconsideration "shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division." To implement this statutory mandate, the Commission's rules of practice (49 C.F.R. 1100.101(a)(2)) explicitly provide that orders of employee review boards are not administratively final:

Decisions of an employee board, whether original or on review, are *not administratively final*. Such employee board decisions shall be subject to review by an appropriate appellate division of the Commission upon the filing of a timely petition in accordance with these rules of practice. (emphasis added).

Accordingly, the court of appeals lacked jurisdiction to review the decision and correctly dismissed the petition for review. See *McGee v. United States*, 402 U.S. 479; *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497-501.

2. Petitioner contends that to exhaust administrative remedies would have been useless in this case, because the Commission had previously (in August 1975) denied a petition for reconsideration of its initial decision to reject the late-filed evidence (Pet. Br. 10). But the fact that reconsideration of the prior order was unsuccessfully sought is entirely irrelevant to the reviewability of the October 1976 order at issue here. The instant order of the employee board was based on the merits of the record as augmented by the late-filed evidence and reflected wholly different considerations

than the 1975 order. That ruling did not reach the merits and merely dismissed the application for lack of evidence.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1978.